In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 622

BRANDYWINE-MAIN LINE RADIO, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioners seek review of the court of appeals' dismissal of a petition for review of a Commission order designating their application for renewal of certain broadcasting licenses for an evidentiary hearing. That court acted properly, and no issue of general importance is presented. Review by this Court is thus not warranted.

On March 17, 1965, the Federal Communications Commission approved the transfer of control of Brandywine-Main Line Radio, Inc., licensee of radio stations WXUR and WXUR-FM, located at Media,

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Pennsylvania, to Faith Theological Seminary, Inc.[1] This approval was made over the objection of various civic and religious organizations and individuals who claimed that the Reverend Carl McIntire, President of the Board of Directors of Faith Theological Seminary, Inc., made false and misleading statements in radio programs and publications, and did not possess the requisite qualifications to operate a radio station in conformance with the Commission's Fairness Doctrine.[2] In approving the stock transfer, the Commission noted that the transferee had specifically represented in response to one of the questions on the Commission's application form that " '[e]qual opportunity will be afforded to opposing viewpoints on controversial public issues * * *'." *Brandywine-Main Line Radio, Inc.*, 4 Pike & Fisher R.R. 2d 697, 700.

On May 3, 1966, Brandywine-Main Line Radio, Inc. filed with the Commission an application for renewal of its broadcast licenses for the period August 1, 1966, to July 31, 1969. Thereafter, on July 19, 1966, a petition to intervene and to deny or to set the renewal applications for hearing was filed by the Greater

[1] *Brandywine-Main Line Radio, Inc.*, 4 Pike & Fischer R.R. 2d 697.

[2] The Fairness Doctrine places licensees under a general obligation (1) to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance, and (2) in doing so, to be fair—that is, affirmatively to endeavor to make their facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented. See 47 U.S.C. 315(a); *In the matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246; *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

Philadelphia Council of Churches, which represented nineteen civic and religious groups, many of whose members resided in the WXUR listening area. The petition alleged that, subsequent to the transfer of control to Faith Theological Seminary, Inc., WXUR had carried unbalanced programming which presented only one viewpoint on controversial issues of public importance, and that WXUR had not abided by its representations and promises made to the Commission.

On August 12, 1966, Brandywine-Main Line Radio, Inc. submitted an answer denying the charges made against it but noting that "the applicant consents to the petitioners' requests for an evidentiary hearing and their request for full status as parties to such hearing" (R. 49).

By Memorandum Opinion and Order released January 25, 1967, the Commission, pursuant to 47 U.S.C. 309(e), designated the renewal applications of stations WXUR and WXUR–FM for an evidentiary hearing. Based upon the pleadings and its own investigation, the Commission found that substantial questions had been raised as to whether the applicant had made misrepresentations to the Commission in the earlier transfer application and whether the applicant was complying with the Commission's Fairness Doctrine (see Pet. 9–11).

On February 23, 1967, petitioners in the instant case sought to have the hearing order set aside. The court below granted the Commission's motion to dismiss in a *per curiam* order dated May 18, 1967, citing *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41. A petition for rehearing *en banc* was denied without opinion on June 19, 1967.

Under 28 U.S.C. (Supp. II) 2342, the courts of appeals have jurisdiction to review "final orders" of the Commission. An order designating a matter for hearing is merely preliminary or procedural and is not a "final order." *Federal Power Commission* v. *Edison Co.*, 304 U.S. 375. The order for an evidentiary hearing here imposes no obligations or penalties, neither forbids nor compels conduct, and denies no applications. In short, it has absolutely no present impact on petitioners.[3] Therefore, that order plainly lacks the requisite finality for judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152–154; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States*, 347 U.S. 990.[4]

Moreover, as the court below indicated, the facts of this case make completely applicable "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*

[3] By operation of law, petitioners are permitted to continue operating WXUR and WXUR-FM until the Commission determines whether to grant or to deny the renewal applications, 47 U.S.C. 307(d); 5 U.S.C. (Supp. II) 558. Petitioners' contention (Pet. 21) that the required broadcasting of a more statement of the hearing issues, pursuant to the Commission's rules, would subject them "to scorn, ridicule and opprobrium," is patently frivolous.

[4] Contrary to petitioners' contention (Pet. 12–13), *Red Lion Broadcasting Co. Inc.* v. *Federal Communications Commission*, (No. 19,938, C.A.D.C., decided June 13, 1967), is inapposite. There the Commission directed the petitioners to take action to remedy a Fairness Doctrine violation. The order for a hearing here has no such direct impact upon petitioners.

303 U.S. 41, 50–51. This principle has been repeatedly applied to attempts to enjoin the holding of a hearing, even where constitutional questions are presented to the agency. *E.g., Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752.[5] There is no reason why the same principle should not be applied here. Petitioners will have ample opportunity to present their contentions, first to the Commission, and then, if the Commission's decision is adverse to them, to the court of appeals.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General.

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General Counsel,
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[5] Petitioners' contentions that certain constitutional issues (Pet. 16–22) and questions relating to the Commission's statutory authority under 47 U.S.C. 315 (Pet. 14–16) are necessarily presented by this case are clearly premature. At the hearing the Commission will also consider the question whether petitioners misrepresented their intent in agreeing to afford equal opportunity to opposing viewpoints on controversial issues. A finding adverse to petitioners on this aspect of the proceeding might in itself lead to petitioners' disqualification and denial of the license renewal applications, without reaching the constitutional or statutory issues relating to the Fairness Doctrine sought to be raised presently by petitioners. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Lorain Journal Company* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A.D.C.), certiorari denied *sub nom. W.W.I.Z., Inc.* v. *Federal Communications Commission*, 383 U.S. 967; *Robinson* v. *Federal Communications Commission*, 334 F. 2d 534 (C.A.D.C.), certiorari denied, 379 U.S. 843.

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